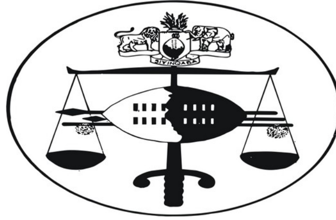

IN THE SUPREME COURT OF SWAZILAND

Held at Mbabane **Appeal Case No. 47/2010**

CITATION: [2010] SZSC 4

In the matter between:

INYATSI CONSTRUCTION	**APPELLANT**
AND	
SUNLA INVESTMENTS (PTY) LIMITED t/a SAVE AND SMILE SUPERMARKET	**RESPONDENT**
CORAM	**FOXCROFT JA**
	MOORE JA
	TWUM JA
FOR THE APPELLANT	**ADV. J.M. Van der Walt**
FOR THE RESPONDENT	**MR. M. Nkomondze**

JUDGMENT

(Ejectment-"illegal lease" void by statutory prohibition – successor in title to landlord continuing to accept rent then applying on motion for ejectment - original lease void but tacit location and giving of notice to vacate – period of notice still running when urgent application brought – no cause of action – appeal dismissed.)

FOXCROFT JA

[1] This appeal was set down for hearing during the present session of this Court after a successful application for urgent enrolment was heard and granted by the Chief Justice. The appellant, a successor to the original lessor, sought the ejectment of a tenant from his recently acquired immovable property on the ground that the lease entered into by the tenant was void since the tenant's directors were not Swazi citizens, and of no force or effect, alternatively on the ground that the appellant had given notice to vacate and the tenant refused to do so. The appellant included in the founding affidavit of Thomas Langenhoven Strydom in its Notice of Motion dated 19 July 2010, the averment that six months notice to vacate had been given on 27 April 2010 in terms of clause 32.2 of the 2005 lease agreement.

[2] Masuku J held that the Land Control Speculation Act, 1972 was applicable to the matter before him and proceeded to deal with the question whether the initial invalidity of the lease prevailed. After considering a number of aspects, the learned Judge a quo then considered the effect of invalidity of the lease agreement. He then stated

> "The question that follows immediately is the legal effect of performance of obligations purportedly under such a contract if it is void."

[3] The response of the respondent was that the applicant was **in pari delicto** and could not rely on the voidness of the contract in order to escape liability for its obligations under the contract. The Judge **a quo** reached the conclusion that the maxim was of no application since the "guilty knowledge" of the appellant's predecessor-in-title could not be imputed to the appellant. He then proceeded to examine the question whether the appellant should be entitled to ejectment without more or whether any intervening consideration might result in "the court finding it unjust in all the circumstances, to grant the Order as prayed at this stage."

[4] The Judge a quo then considered the respondent's submission that the appellant was approbating and reprobating by issuing a notice of ejectment "under the very same lease agreement that is sought to be impugned" and went on to note that the respondent's directors had now become Swazi citizens. This is not disputed. He then held in paragraph [43] of the judgment that the appellant's position was not sound at law and, using the analogy of legitimization of children **per subsequens matrimonium** of their parents, held that it was preposterous that "after the Respondent's directors were Swazi citizens [they] should still be required to seek consent when they are already Swazi citizens."

[5] In my view this was an inappropriate analogy, resulting in an incorrect view of the law. The example, in the law of persons, relating to legitimization of children concerns matters of status. Public policy obviously requires that children should not be stigmatized and denied the benefits of legitimate children where their parents marry after their birth. The citizenship requirement in this case was to protect all Swazi

nationals and intended to prevent land speculation by foreigners. The lease failed to meet the legal requirements of the applicable statute and was void **ab initio**, incapable of ratification or revival. [See **Wessels : Law of Contract** 2nd Ed. Vol. I : paras 639, 683].

[6] Although the Judge a quo did not specifically so hold, he clearly wrongly proceeded on the basis held that the lease, originally void, became enforceable once the appellant's directors acquired Swazi citizenship. The remainder of the judgment concerned the question whether proper notice under the lease had been given. The conclusion reached was that undisturbed possession had not been given to the respondent during the running of the notice period. The application was dismissed with costs.

[7] Adv. Van der Walt submitted that the main contention of her client was that the 2005 lease was void and unenforceable. She submitted that the **par delictum** rule did not apply since the appellant had from the start queried the legal validity of the lease. She drew attention to paragraph 18.1.2 of the founding affidavit which introduced the letter marked "ICL 9". That letter

from appellant’s attorneys is dated 31 March 2010. It records that the attorneys were of the view that the appellant was not in possession of a valid lease since the 2008 lease signed by Mr. Motsa was intended to supersede the 2005 lease and was invalid because Mr. Motsa was not authorized to sign on behalf of the company which was the lessor. The letter proceeded to record

> “In any event the previous lease is invalid in that the necessary Land Control Board consent had not been obtained and we assume that it was for this reason that Mr. Motsa entered into a purported new agree[ment] with your client…”

[8] The attitude of the appellant’s attorneys appeared to change by June 2010. In a letter dated 8 June 2010, they referred to the “lease agreement entered into between Oxford Leasing Company (Swaziland) and your client dated May 2005”. The letter proceeds as follows:-

> “2. In terms of the lease agreement your client was obliged to pay certain additional costs over and above the rental. We are accordingly setting out details of the

> aforesaid costs which have been incurred since your client took occupation of the premises in October 2005. In addition we shall be pointing out certain clauses in the agreement with which your client has not complied."

A number of categories of indebtedness in terms of the lease follow, and a demand for payment of the sum of E738,650 was made. The letter closed with the common

> "In the interim all our client's rights remain expressly reserved."

Adv. Van der Walt suggested that this last line in the letter amounted to a reservation of the position that there was no lease at all. I do not read it that way. On the face of it, such a statement covers the contents of the letter only. The letter of demand is unequivocally based on the existence of a lease. What is more, the letter from appellant's attorneys to respondent dated 27 April 2010 gave 6 (six) months formal notice to vacate

> "in terms of Clause 32.2 of the abovementioned lease agreement that (sic) the lease agreement will be cancelled on the 28th October 2010 and that you will be required to vacate the premises on or before that date."

[9] In the face of this letter it is difficult to understand how it was argued on the 2nd and 3rd of August 2010 before Masuku J that the main thrust of the appellant's case was that the lease was void, the tenant was in unlawful occupation, and the owner of the property "leased" was entitled to the immediate restoration of his property.

[10] There is a great deal of authority arising from so-called illegal leases in South Africa. **Christie** points out in the 5th Edition of **The Law of Contract** that the leading case of **Jajbhay v Cassim**, 1939 AD 537 suggested that if the illegal lease has been terminated for a reason and in a manner recognized by the lease (illegal as it is) the landlord's claim for ejectment of a tenant who refuses to vacate will succeed. The learned writer continues at p. 401 to say

> "Underlying all these cases is the uncomfortable fact that, although the lease is illegal and

therefore void .. its theoretically non-existent terms are in practice decisive, which is difficult to explain logically."

[11] In the present appeal, an added complication is the fact that the present owner of the disputed property was not an original party to the 2005 lease. It was held in **BHYAT'S DEPARTMENTAL STORE** (PTY) LTD v **DORKLERK INVESTMENTS (PTY) LTD** 1975 (4)SA 88 that where property subject to an illegal lease was sold to a buyer who did not in any way adopt or enforce the illegal lease, he could eject the tenant as of right. On the contrary, a buyer who makes himself a party to an illegal lease by adopting or enforcing it will of course place himself in an ordinary **JAJBHAY v CASSIM** situation.

[12] While Adv. Van der Walt urged that the appellant was entirely guiltless, Mr. Nkomondze drew attention in particular to the demand for E738,650 to which I have already referred. It is not necessary for present purposes to decide whether any "guilt" at all attaches to the appellant.

See : **Christie**, op.cit. at 401, where it is said, with reference to authority, that the **in pari delicto** maxim does not presuppose the exact equality of the plaintiff's and defendant's guilt.

[13] What is more important is to have regard to what took place in this matter before and after the appellant acquired ownership of the property described as Lot 760, Dr. Hynd Street, Trelawney Park, Manzini on the 5th November 2009. In her answering affidavit on behalf of the respondent, Anita D'Souza says the following in paragraph 6.15:-

> "A further glaring omission is in respect of the lease agreement that Respondent entered into with the said Moses Motsa, who is a director of Motsa Investments (Pty) Ltd and also, I believe, a director and shareholder of Applicant. The applicant has not been candid with this Honourable Court as it should have informed this Honourable Court about Motsa's dual role as a director of Motsa's Investment (Pty) Ltd and also of the Applicant."

The response to this averment included a statement that

> "Mr. Motsa is a shareholder (and not a director) of the applicant and it is unclear how his shareholding should be relevant to these proceedings."

[14] The point being made by the respondent was that Mr. Motsa would have known of the legal difficulty attaching to the 2005 lease and that the 2008 lease was intended, as already referred to earlier in this judgment, to supersede the 2005 lease and remove the legal obstacle. The 2008 lease was for 3 (three) years and section 2 of the Land Speculation Control Act, 1972 provided, as Mr. Nkomondze pointed out in argument, that a controlled transaction (void without the consent of the Land Control Board) shall not include the lease of residential or business premises to a **resident** of Swaziland or a company registered in Swaziland for a period **not exceeding three years or a renewal of the period of such lease for a period not exceeding three years.** (my emphasis)

It is clear from paragraph 5.2 of the answering affidavit that the deponent, her husband and brother possessed valid residence permits. Annexures "SUN 3", "SUN 4" and "SUN 5" bear testimony to this. Accordingly, the 2008 lease would have met the requirements of the Land Speculation Control Act, 1972.

[15] As is pointed out in "ICL 9", the appellant's attorneys took the view that

> "Quite clearly the lease signed by Mr. Motsa was intended and did supersede the previous lease agreement …"

The lease failed only because Mr. Motsa signed it in his personal capacity and not with the authority of Motsa Investments (Pty) Ltd which had purchased the leased premises from the original landlord. But for this technical difficulty which could easily have been rectified, the 2008 lease would have been perfectly valid until 2011.

[16] The reply to the averment of the knowledge and involvement of Mr. Motsa is that he was not a director. What is beyond doubt is that the 2008 lease would

have solved the legal difficulties of the respondent and that Mr. Motsa must have known this. When his company sold to the appellant it is highly probable that the legal difficulty of the 2005 lease would have been known to the appellant. Despite this, the appellant started receiving rentals from the respondent from August 2009, even before it bought the property from Mr. Motsa. That allegation on the papers is not denied.

[17] In the circumstances of this case, an evidential burden rested upon the appellant to explain if it wished to do so that it was not on 5 November 2009 (the date when the applicant acquired ownership of the property) aware that the 2005 lease was void for illegality. There are many indications that the appellant was so aware, including the statement in reply by Mr. Strydom that

> "The Applicant from the outset questioned the validity of the Respondent's right to occupation. The Applicant was entitled to receive moneys for the beneficial occupation by the Respondent, unless the Respondent is contending that it had been entitled on some basis to gratis occupation and use of the premises."

[18] The sums which the appellant sought and received from the respondent were never categorized as damages for holding over.

"ICL 7" records that

> "You will agree with us when we confirm that you purchased the property from someone who acknowledged our lease. Rentals have been paid to you ever since you purchased that property from Motsa Investments (Pty) Ltd."

The question of rentals is not specifically dealt with by the appellant who annexed this letter ("ICL 7"). All that was said was that the allegations of a lease were denied.

In due course on 27 April 2010 the appellant gave six months notice to vacate in terms of the 2005 lease and later made the claim for payment of sums due under that lease in the sum of E738,650. The letter demanding that sum is dated 8 June 2010, about six weeks before the Notice of Motion for ejectment was signed.

[19] In **Kerr's Law of Lease,** Second Edition (the only one available to me) the learned author deals at p.189 with implied leases or "tacit leases." Where parties of contractual capacity "adopt and continue the position which the termination of the lease found them in; in other words, …the lessor is content that the lessee should remain, and the lessee is content to remain" then a new lease has been entered into. The words cited are those of Innes, CJ in **BOWHAY v WARD,** 1903 T.S. 772 at 779. A number of other authorities are given by **Kerr**.

[20] In my view this is what happened in the present matter. The appellant took over an existing situation when it bought the premises from Mr. Motsa. It clearly intended to carry out major construction works but from August 2009 was content to receive monthly payments from the respondent

"for the beneficial occupation by the Respondent …"

In effect, this was rental on the existing terms for the use of the existing premises. The appellant

"questioned the validity of the Respondent's right to occupation" from the outset, in the words of Mr. Strydom, the Construction Manager of the applicant. The appellant therefore treated the situation, not as the continuation of an existing lease (which was void anyway) but as a new lease, albeit a temporary one. The terms of the new lease were **mutatis mutandis** the same as those of the 2005 lease, and there was no impediment to the contractual capacity of the respondents directors since they had become Swazi citizens on 11 September 2009.

[21] What puts this beyond all doubt is the giving of

> "6 (six) months formal notice in terms of clause 32.2 of the abovementioned lease agreement that (sic) the lease agreement will be cancelled on the 28th October 2010 and that you will be required to vacate the premises on or before that date." ("ICL 15," record 93)

It is clear that the notice provision of the old void lease had been adopted by the appellant as a necessary step to ejectment. Once this happened, the time period of the notice had to be allowed to elapse before a cause of

action would arise entitling the appellant to eject the respondent.

[22] Without waiting for the necessary six months to run, the appellant chose to move the High Court urgently on the 19th July 2010 when the Notice of Motion was signed and filed. The respondents were specifically permitted in the letter giving notice to remain in the premises until the 28th October 2010 and no cause of action arose to eject them until the 29th October at the earliest.

It is well-established that when there is a valid cause of action before the court in a proceeding, the court may allow the plaintiff to add a cause of action that has accrued or been perfected since the issue of summons, but it will not do so when no cause of action at all existed at the time when summons was issued.

See Herbstein and Van Winsen, Civil Practice of the Supreme Court of South Africa, Fourth Ed. at p415 and authorities there cited.

The general rule is that a plaintiff or applicant who wishes to institute proceedings must have a subsisting cause of action at the time when the proceedings are commenced. See **PULLEN v PULLEN** 1928 W.L.D 133 at 135. While an amendment to complete a cause of action which did not exist at the date of the pleading may be allowed in exceptional circumstances only, this would have no application in the present appeal.

Until the period of time allowed for the respondent to occupy the premises had elapsed in terms of the tacit lease, no cause of action for ejectment would have arisen.

[23] Accordingly, the order of the court a quo dismissing the application was, for reasons different from those stated by the learned Judge, correct.

It is ordered that the appeal is dismissed with costs.

J.G. FOXCROFT
JUDGE OF APPEAL

I AGREE.

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S.A. MOORE

JUDGE OF APPEAL

I AGREE.

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DR. S. TWUM

JUDGE OF APPEAL

Delivered in open court at Mbabane on 30th November 2010.